SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966 7

No. ~~1426~~ 195-

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered February 10, 1967.

Citations to Opinions Below

The majority and dissenting opinions in the Court of Appeals, which affirmed the judgment of the District Court, are reported in 373 F. 2d 250 and printed in Appendix A. Petitioner applied for a rehearing before the Court of Appeals, and the opinion denying it, which has not yet been reported, is printed in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered February 10, 1967. On February 24, petitioner filed a motion for reargument. After consideration, the Court ordered the United States Attorney to file a reply and only denied the application on March 31, 1967. On April 20, 1967, Mr. Justice Harlan extended the time for filing this petition to May 29. The mandate has been stayed by the Court of Appeals pending final disposition by this Court.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

The Questions Presented

The petition presents two questions:

1. What should be the test of harmless error where a significant statement of a critical witness is withheld, contrary to the Jencks Act (18 U.S.C. §3500); and, more particularly, whether substantially the standard, recently announced by this Court in *Chapman* v. *California,* 386 U. S. 18 (1967), as to various constitutional errors, should be applied to Jencks Act violations. The *Chapman* test is similar to the one urged, as to denied Jencks Act material, by Mr. Justice Brennan (with the concurrence of the Chief Justice and Justices Black and Douglas) in the dissenting opinion in *Rosenberg* v. *United States,* 360 U. S. 367, 375-76 (1959). There is also a subsidiary question, whether the attempt by the court below to distinguish *Dennis* v. *United States,* 384 U. S. 855 (1966), has any validity.

2. Whether Judge Irving Ben Cooper's charge to the jury here, which was so sharply criticized in the dissenting opinion of Chief Judge Lumbard, can possibly be condoned under the harmless error doctrine applied generally in the federal courts. The determination of that question may also resolve the issue raised by Mr. Justice Harlan in his dissenting opinion in the *Chapman* case, 386 U. S. at 50, note 3.

This case was twice before the Court of Appeals. After Birnbaum's first conviction (before Judge Thomas F. Murphy), the Court of Appeals unanimously reversed [337 F. 2d 490 (1964)]. While the reversal rested largely upon the erroneous admission of prejudicial evidence, the Court also considered the refusal of the government to produce, under the Jencks Act, a prior statement by Leonhardt, the chief prosecution witness. As will appear, Judge Moore erred in holding that the refusal of that statement was not in itself reversible error. He in effect invited the district judge upon the second trial to exercise his "discretion" to make the statement available to the defense (337 F. 2d at 498).

Prior to the retrial Leonhardt died, and the second trial presented a situation analogous to the one in the recent *Dennis* case, 384 U. S. 855, 868, esp. note 13 (1966), where grand jury minutes had been withheld and one of the witnesses died between the first and second trials.

After Leonhardt's death and in advance of the second trial, the district court required the government to produce the statement, and after defense counsel had his first opportunity of reading it, he moved to exclude Leonhardt's testimony on the second trial upon the ground

that there had not been, on the first, the full opportunity of cross-examining him contemplated by the Jencks Act. Judge Cooper, before whom the second trial was had, denied the motion and Leonhardt's prior testimony was introduced (17-31a, 131-84a).[1]

In upholding the second conviction, and denying the subsequent motion for reargument, Judge Kaufman rested his rejection of the Jencks Act contention largely upon the assertion that the withholding of the statement on the first trial before Leonhardt's death was harmless error (A 29-30; B 3-5). In so doing, it will appear, he failed to respect the limitations upon the harmless error doctrine, especially as applicable to the Jencks Act.

The further question, whether the charge to the jury was, as Chief Judge Lumbard said, so prejudicial as to deprive petitioner of a fair trial (A 31, 39), was properly preserved by exceptions (480-84a, 405-09a).

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions are the Fifth and Sixth Amendments. The statutes are the Jencks Act (18 U.S.C. §3500) and the federal harmless error statute (28 U.S.C. §2111). The related harmless error rule is Federal Rule of Criminal Procedure, 52(a).

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[1] The appendix method of appeal was used in the Court of Appeals and, pursuant to Rule 21(3) of this Court, the appendices were filed in this Court. We will designate the appendix of the petitioner (appellant below) by "a", and the appendix of the respondent by "b", following the page reference, and the few additional citations to the transcript of the trial filed in the Court of Appeals and in this Court, by "R" preceding the page reference. In contrast to the references to the appendix below, reference to the appendices attached to this petition are preceded by a letter, "A", "B", etc.

For convenience, we have included in appendix D the whole of Judge Moore's opinion on the Jencks Act point on the first appeal.

Statement

Birnbaum is a certified public accountant who enjoyed an excellent reputation prior to his conviction. His firm had prepared the income tax return for Leonhardt for 1955 and he was convicted after a jury trial of conspiring to bribe, and of bribing, Harold Simon, an agent in the Internal Revenue Service, in violation of 18 U.S.C. §371 (the conspiracy provision), §201 (the bribery section) and §2 (aiding and abetting). The indictment named the three principal witnesses who testified against Birnbaum—Alexander Guterma and Robert Eveleigh, as well as Leonhardt—as co-conspirators but not as defendants (7-12a).

1. The crucial issue upon the trial

There is no question that Guterma, Leonhardt and Eveleigh had bribed Simon, the agent, who was named as a defendant and pleaded guilty (1-2a). The sole question was whether, as Guterma and the other two asserted, Birnbaum had instigated the bribery, or otherwise had a part in it. Guterma, Eveleigh and Leonhardt had everything to gain from making false accusations against Birnbaum. After serving one term in jail, Guterma avoided a second term on another sentence, by implicating Birnbaum; Eveleigh, an alien, who had also served a sentence, secured a stay of his deportation for years by joining up with Guterma and testifying against Birnbaum upon the two trials; and Leonhardt, an admitted perjurer, avoided even a trial (94-97a, 292-93a, 296-97a, 398a). Birnbaum took the stand and the critical question on the trial was one of credibility, between him and his accusers (316a, 398a).

In describing "the facts" in the opinion, Judge Kaufman stated, as so often is done, only the prosecution's version (A3-4). While he said that the evidence was "overwhelming" against Birnbaum, his conclusion rested, as Judge Kaufman acknowledged, upon the testimony of Guterma, Leonhardt and Eveleigh (A 4).

2. The occasion for the Jencks Act statement; and its treatment during the first trial and appeal

After Guterma and the others had made their accusations against Birnbaum to the FBI and before there was any indictment, Leonhardt suggested to the FBI that he might carry on conversations with Simon and Birnbaum. The FBI supplied him with a concealed recording device, and he saw Simon first and Birnbaum two weeks later. On the first trial, Leonhardt mentioned that he had spoken to Simon; the transcript of that taped conversation was produced; and Leonhardt also testified orally to his conversation with Simon. In so doing he gave testimony against Birnbaum, which the Court of Appeals on the first appeal held was erroneous and prejudicial (337 F. 2d at 494-96). While asking Leonhardt about his conversation with Simon, the prosecutor avoided asking him anything about his talk with Birnbaum. Leonhardt testified in detail to other supposed conversations with Birnbaum, in which he asserted that Birnbaum had instigated the bribery and that, at the latter's suggestion, he had given Birnbaum $10,000 to give Simon (145-49a).

In view of the mission he had undertaken to secure admissions from Birnbaum and the criticalness of Leonhardt's testimony upon the trial, it was evident to defense counsel, as it would be to any experienced lawyer, that the transcript of the tape might be valuable for Leonhardt's cross-examination—for its bearing upon his credibility and possible direct contradictions. Counsel asked

for the transcript as Jencks Act material, but the prosecutor refused to turn it over, saying that since he had not inquired of Leonhardt about his conversation with Birnbaum, the transcript was not "related" to Leonhardt's testimony, within the meaning of the Jencks Act. After examining the transcript, Judge Murphy, who presided on the first trial, ruled with the prosecutor and apparently adopted his reasoning (R 2438-39).

The transcript of the Leonhardt-Birnbaum conversation was transmitted to the Court of Appeals under seal. While we had not seen it, we urged upon the first appeal (among other points) that there was no merit to the limited ground upon which Judge Murphy apparently acted; that under the authorities a statement is "related" if it bears upon the witness' credibility; and that the transcript here was related to Leonhardt's testimony, if, it appeared, in spite of the mission upon which he was engaged, that he did not dare accuse Birnbaum when they were face to face (D 1).

The opinion of Judge Moore on the first appeal is important because of its effect, among other things, on the opinion on the second appeal, upon which he also sat. Judge Moore recognized that a transcript or other statement bearing upon a witness' credibility is "related" to his testimony within the Jencks Act, but in the course of his opinion, which is not entirely clear, he seems to say that it is not enough that a statement falls within the Act to make it producible; that there is room for discretion on the part of the trial judge as to whether a statement would be useful for impeachment; and that the trial court's ruling is not reversible unless it is "clearly erroneous" (D 1-3, esp. at D 3). Judge Murphy did not place his refusal to turn over the transcript on any finding of fact; it rested, apparently, upon his conception of the law.

3. The production of the statement after Leonhardt's death; its nature and importance

After Leonhardt's death and before the second trial, the prosecution continued to oppose the delivery of the transcript of the Leonhardt-Birnbaum conversation, but Judge Tyler ordered it delivered (R 2229-37, 16a, 18-21a). After trial counsel for Birnbaum had examined the tape, he moved, as we have said, unsuccessfully to exclude Leonhardt's testimony prior to trial and again to suppress it during trial. Leonhardt's testimony was received and the transcript of the tape was introduced in evidence (17-31a, 127a, 130, 131-84, 348a—Govt. Exh. 27, reproduced at 350-95a).

The transcript of the Leonhardt-Birnbaum conversation, which occupied over an hour, runs 45 printed pages. We will not attempt to describe it in any detail, or furnish the background necessary for its full understanding which we did below in our principal brief (Applt. Br., CA, pp. 29-32). Instead, we will confine ourselves to pointing out how the transcript bore upon Leonhardt's credibility. Besides asserting on the trial that Birnbaum had instigated the bribery and that he had given Birnbaum $10,000 for Simon, Leonhardt testified that Birnbaum had devised the form of transaction, which gave rise to the tax question that Simon had cleared in examining Leonhardt's return, and that Birnbaum had dealt with Simon at every step (135-36a, 144-49a). In the course of the prior taped conversation with Birnbaum, Leonhardt, who was a member of the bar, had every opportunity of bringing up and testing Birnbaum about various aspects of his asserted participation. For instance, Birnbaum told Leonhardt that he never understood the transaction, it having been devised by Leonhardt's attorney, and that he did not recall Simon well (131a, 372a, 368-69a, 350a). If what Leonhardt said on the first trial was true, you would

expect him to have made some caustic reply to those statements, but the transcript shows that he remained mute. And in his summation on the second trial, the prosecutor admitted (423a):

> "I am hard pressed to answer it at times, why didn't Leonhardt out and out say, 'Saul, what about the $10,000 I gave you in 1957'?
>
> Why didn't he [Leonhardt] do that, why didn't he come out and say it? That is a hard question. I don't know."

Not only did the transcript bear sharply upon Leonhardt's credibility, but there was direct contradiction between what he said upon the trial and what he admitted in the course of his prior conversation with Birnbaum (compare 135-36a with 368-69a, 372a). If anything more is necessary to point up the importance of the transcript withheld on the first trial, it is sufficient to add that on the second trial, the jury during its deliberations called for the transcript (488a).

4. The charge

Although the case had been competently tried and summed up by both sides, Judge Cooper discussed—in fact reargued—the factual issues in the course of a charge that continued for two hours and occupies 56 printed pages.[1] Judge Cooper did not limit himself to his text, at points talking extemporaneously (A 39), and, as Chief Judge Lumbard said in his dissenting opinion, the charge was of "the stuff of which prosecutors make their summations; it ought not to be the stuff with which judges charge juries" (A 35).

[1] On the first trial, the judge had covered all the necessary points in 19 pages (A 32).

In his dissenting opinion, Chief Judge Lumbard describes certain of the many objectionable parts of the charge (A 33-39). In the majority opinion, Judge Kaufman sought to pass them off. In one particularly objectionable portion of the charge, Judge Cooper had said to the jury (473a):

> "The government contends, or at least this is my suggestion, that the defendant was up to his ears in graft and corruption, with the Denver deal[1], with the various transactions from which he made a profit; that they were shady in character, he well knew, and this was long before Simon made his appearance on the scene."

The government had made no contention that there was graft or corruption in the "Denver deal". Nor was there any evidence that Birnbaum had made profit from other "transactions". Referring to this part of the charge, Judge Kaufman said he did not believe it was prejudicial because it came so late in the instructions to the jury (A 25-26). We can think of no reason why a highly objectionable statement should be less prejudicial because it comes immediately before the jury retires for its deliberation. In fact, the situation became so bad during the course of Judge Cooper's charge, that after defense counsel stated his objections (out of the presence of the jury), the prosecutor urged Judge Cooper to modify his charge, but he did not change a word (483-85a, 488a).

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[1] "Denver deal" refers to the transaction involved in Leonhardt's tax return. He had reported his profit as a long-term capital gain and the Government contended that Simon was bribed to overlook the possibility that it should have been treated as a short-term gain (54-56a, 108a, 410a).

Reasons for Granting the Writ

While we think it is clear from a careful reading of the Jencks cases in this Court that the room for the application of the harmless error doctrine is very limited, this Court has not so declared in any prevailing opinion, and some of the courts below, as well as the federal prosecutors, need, as will appear, a clear mandate on this point. None of the situations which are frequently urged to minimize the error in Jencks Act violations exists here. In disregarding the applicable standard of harmless error in Jencks cases, the court below also acted at variance with *Dennis,* 384 U. S. 855. And the errors in the charge to the jury, upon which the court below divided, furnish additional grounds for review.

1. The applicable harmless error standard in Jencks cases is clearly suggested by *Rosenberg* and *Chapman*

While it might be helpful, in pointing up the prevailing view of this Court, to trace the development from the original *Jencks* case, 353 U. S. 657, 668-69 (1957), through *Palermo,* 360 U. S. 343 (1959), *Rosenberg,* 360 U. S. 367 (1959), *Clancy,* 365 U. S. 312 (1961), *Scales,* 367 U. S. 203, 257-58 (1961), *Killian,* 368 U. S. 231, 243-44 and 275-77 (1961), and *Dennis,* 384 U. S. 855 (1966), it is principally *Palermo, Rosenberg* and *Dennis* that point the way.

In *Palermo,* the first case decided after the adoption of the Act itself, Mr. Justice Frankfurter—writing for himself and Justices Clark, Harlan, Whittaker, and Stewart—laid down guidelines to be followed in the application of the Act, with which the Chief Justice, and Justices

Brennan, Black and Douglas disagreed. Mr. Justice Frankfurter wrote (360 U. S. at 353):

> "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts."

Taking the contrary view, Mr. Justice Brennan stated for the minority (360 U. S. at 364, note 4):

> "Of course if the memorandum [the prior statement] had been one falling within the statute, I need hardly add that the judge would have had no discretion to refuse to order its production to the defense, in the light of the statute's affirmative command."

In *Rosenberg,* decided later in the same year, there was a division within the Court whether the information elicited by the defense on cross-examination was the equivalent of the withheld Jencks Act statement. In writing for the majority, Mr. Justice Frankfurter said that while an "appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents", the same information, he wrote, had been otherwise obtained and the error was "clearly" harmless (p. 371). In dissenting for the Chief Justice and Justices Black, Douglas and himself, Mr. Justice Brennan took issue with the assertion that the information elicited on cross-examination was the equivalent of the withheld statement, and stated the harmless

error doctrine that he felt should be followed, saying (360 U. S. at 375-76):

> "* * * when the defense has been denied a statement producible under the statute, an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous."

Mr. Justice Brennan went on to say that "only a very strict standard is appropriate for applying the harmless error doctrine" in Jencks Act cases, and he indicated something of the permissible range by three examples—where the defense received from another source information clearly as valuable, for purpose of cross-examination, as the withheld statement; where the testimony of the witness whose statement was withheld was unimportant; or where the witness' statement is "wholly void of possible use for impeachment" (pp. 376-77).

In *Dennis,* so recently decided, the principal witnesses for the prosecution had testified before the grand jury and the Court held, by analogy to Jencks cases, that the defendants were entitled to examine the grand jury minutes (covering the witnesses' testimony), for purpose of cross-examination. Mr. Justice Fortas wrote for a unanimous court that the defendants "were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination" (384 U. S. at 875). Three of the witnesses were still alive, but the fourth, Mason, had died after the first trial and as to him, Mr. Justice Fortas stated (p. 868, note 13):

> "Since the omission to require production of Mason's grand jury testimony with a view to

> impeachment can no longer be remedied, his trial testimony, under our holding herein, is no longer available to the Government in the event petitioners are retried."

Referring to Jencks cases, Mr. Justice Fortas added (p. 875):

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

The statement repeatedly made by this Court in language similar to Mr. Justice Fortas, that it is not for the trial or appellate court to say how useful a statement producible under the Jencks Act may be for cross-examination (*Jencks,* 353 U. S. at 668-69; *Rosenberg,* 360 U. S. at 371; *Clancy,* 365 U. S. at 316; *Scales,* 367 U. S. at 258), necessarily implies that there is a limited scope for the harmless error doctrine in the appellate court. The proper standard to be applied in view of that limited scope is, we submit, stated in Mr. Justice Brennan's dissent in *Rosenberg* (pp. 12-13, *supra*). The standard urged by him there is, as we have suggested, not substantially different from the test that this Court so recently applied to some constitutional errors in *Chapman.* There, Mr. Justice Black said that before such error "can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (386 U. S. at 24). Moreover, it is proper that much the same standard be applied to the Jencks Act, which, as Mr. Justice Brennan pointed out in *Palermo,* lies close to the "commands of the Constitution" (360 U. S. at 362-63).

After we have pointed up the respects in which the Court of Appeals here departed from the applicable standard, we will develop the situation in the other circuits.

2. The court disregarded the proper test of the harmless error doctrine and its decision is also inconsistent with *Dennis*

While the transcript was a record of a conversation between Leonhardt and the defendant Birnbaum, its potential use was for the cross-examination of the former, the principal witness for the prosecution. That the conversation was with the defendant is of no significance. That was the situation, for one, in *Clancy* v. *United States*, (*supra*—365 U. S. 312). Nor can there be any question under *Rosenberg* (360 U. S. at 371), as well as *Clancy*, that if the transcript of the tape did no more than go to the credibility of Leonhardt, it was "related" to his testimony on the trial and producible under the Jencks Act.[1]

[1] We do not think the Solicitor General will urge that the transcript did not fall within the definition of a "statement" within section (e) of the Act (E 3). In *United States* v. *Sopher*, 362 F. 2d 523, 525-26 (CA 7, 1966), cert. den. 385 U. S. 928, Judge Schnackenberg did suggest, as one ground for dismissing the Jencks Act contention there, that a tape of a reported conversation between a defendant and a witness who was working for the FBI did not fall within the section, because the witness was not an "agent of the Government". But on the application for certiorari, the Solicitor General pointed out that Judge Schnackenberg's statement was unnecessary to the decision and that this Court did not need to consider the suggested ground because the same information was given to the defense in two other forms (Br. for the U. S., p. 15 and Note 10).

Judge Schnackenberg construed the Act far too narrowly. At one time, there was a question as to whether a memorandum made by an agent-witness was producible under the statute and the Solicitor General very properly took the view that by delivering the memorandum to his superior, the agent adopted the memorandum within the meaning of clause 1 of section (e) [Br. for the U. S., pp. 26-27, in

True, the transcript was produced on the second trial and admitted in evidence, but that was hardly the equivalent of having the transcript available for the cross-examination of Leonhardt when he was still alive. A skillful lawyer on cross-examination could have confronted Leonhardt in various ways with the fact that during an hour-long conversation, which he had arranged for the purpose of seeking to obtain admissions from Birnbaum, he did not once suggest that Birnbaum was in any way engaged in the bribery. And counsel could have dwelt upon the other inconsistencies, such as between Leonhardt's statement on the trial that he relied on Birnbaum for tax advice as to the transaction reported in his return and his admission, during his prior conversation, that he had relied upon his attorney (135-36a, 368-69a, 372a). Then too it would have been known whether there was anything to the explanation offered by the prosecutor on the second trial, that Leonhardt might not have brought up the subject of the bribery in the course of the conversation, because he thought Birnbaum was on guard (423-24a). The same argument that the transcript would be available on a retrial could have been made in *Dennis*.

On the motion for reargument, the court below suggested first, in a portion of the opinion that we at least

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Needleman v. *United States*, 362 U. S. 600 (1960)]. In the same way here, Leonhardt must be taken, under clause 2, as having made and approved the statement contained on the tape to an agent of the FBI when he turned over the tape to him.

In his opinion, Judge Moore recognized that the transcript constituted a "statement" within the terms of the Act (D 1), and the government never contended the contrary. But if there is any question that the transcript falls within the Act, its denial would present questions under *Brady* v. *Maryland*, 373 U. S. 83, 86-87 (1963) and *Giles* v. *Maryland*, 386 U. S. 66 (1967).

find hard to understand, that Judge Murphy may not have committed any error in refusing the production of the tape in the first instance (B 2-3). As we have seen, there is no question that the transcript was related to Leonhardt's testimony and producible under the Act; any suggestion to the contrary in the opinion on the motion for reargument is not even in keeping with Judge Moore's position on the first appeal.

Continuing, the court said that if there was error, it was harmless and for that conclusion, the court relied on two circumstances.

First, it suggested that Birnbaum was a party to the conversation with Leonhardt and that his recollection of it gave him the same information as the transcript would (B 3). In that way, the court apparently sought to bring this case within the limited exception of *Rosenberg,* 360 U. S. 367, and *Killian,* 368 U. S. 231, 243-44, 276-77. When the argument is made that the defendant received the same information from another source, the question always is, as Mr. Justice Brennan pointed out in his dissent in *Rosenberg* (360 U. S. at 376-77), whether the information is the *equivalent* of the withheld statement for the purpose of cross-examination. The conversation between Leonhardt and Birnbaum took place in October 1961, two years before the trial (47a, 2a), and it is idle to suggest that Birnbaum or anyone else could possibly recall the conversation with anything approaching the accuracy of a transcript.[1] With a transcript of 45 printed pages, defense counsel would have had something solid with which to cross-examine Leonhardt. How can it be maintained that an uncertain recollection of two years

[1] Even the jury, who heard the transcript only a few days before, asked to see it during its deliberation (488a-Ex 27).

before is the equivalent of a transcript of an extended conversation? If it could be said that a possible recollection is the equivalent of the statement, there never could be error in denying a defendant a copy of his own statement. In *United States* v. *Remington*, 191 F. 2d 246 (CA 2, 1951), the court held that *Remington* was entitled to see the minutes of his own testimony before the grand jury as to which he was charged with perjury, and Judge Swan said, "His memory of what he said is no adequate substitute for the minutes themselves" (p. 251). See also Mr. Justice Brennan's dissent in *Rosenberg* where the claim was made that the information obtained was the equivalent of that withheld for the purpose of cross-examination (360 U. S. at 376).

Second, the court suggested that Birnbaum deliberately did not cross-examine Leonhardt as to the conversation, and that his counsel on the first trial waited until his summation to say to the jury that Leonhardt had testified to his taped conversation with Simon but had said nothing about his conversation with Birnbaum, and that if, in that conversation, Leonhardt had charged Birnbaum with participation and he had admitted it, the conversation would have been brought out by the prosecution (B 4-5, Rec. on 1st appeal, SM 1542-44).[1]

There is every good reason why counsel for Birnbaum on the first trial should have hesitated to have asked Leonhardt about the conversation. With the transcript denied, he could not possibly have any confidence that Leonhardt would have confessed that he did not bring up the subject during his conversation with Birnbaum and even if we were to assume that Birnbaum two years later could have recollected the details of the conversation

[1] For the purpose of such material as we have just referred to, we had the record on the first appeal certified and filed with the Clerk.

and had reported them to his attorney, his counsel could not have had any confidence that upon his cross-examination Leonhardt would have admitted to the inconsistencies between his testimony on the trial and his prior statements to Birnbaum (pp. 8-9, 16, *supra*). No one can seriously suggest that the slight argument made by defense counsel on the first trial, consisting of a few pages in a summation running some 63 pages, was the equivalent of the production of the transcript of 45 pages (compare Rec. on 1st appeal, SM 1542-44, with 350-95a). No matter how it is put, it is clear that what the court below was doing in saying that the error was harmless is exactly what this Court has frequently warned against—a speculation as to how effectively a withheld statement could have been used.

The exposure of the argument that Birnbaum's recollection of what happened two years before is the equivalent of the transcript disposes also of the contention, made in a footnote in the opinion on the motion for reargument, that Birnbaum's recollection distinguishes the present from the *Dennis* case (B 4, note 1).

3. The decision here is in conflict with the decisions in other circuits, as well as with rulings of other panels in the Second Circuit

In holding on the first appeal in this case that Judge Murphy's refusal to require production of the statement was not a ground for reversal, unless his determination was "clearly erroneous", Judge Moore applied the rule which is applicable when the trial judge makes a determination of fact and not one of law or a mixed finding of both. It is one thing to suggest that the trial judge has an advantage over an appellate court in determining a fact because he sees the witnesses, and its quite another to suggest that he is a better judge of the law. The clearly erroneous doctrine only applies to determinations of fact [see *Campbell* v. *United States,* 373 U.S. 487, 493 (1963); 5 Moore, *Federal Practice* (2d ed.) par. 52.03 [2], pp. 2630-31].

In *Cardillo,* 316 F.2d 606, 615-16 (CA 2, 1963), cert. den., 375 U. S. 822, upon which Judge Moore relied in his opinion on the first appeal in Birnbaum, it does not appear that the lower court's determination did not rest upon a determination of fact and, in seeking certiorari, the petitioner did not intimate the contrary (appl. pp. 18-19). There is no suggestion here that there was a question of fact upon which Judge Murphy could have rested his determination; most likely he acted upon the erroneous legal contention made by the prosecutor (p. 7, *supra*).[1] To apply the "clearly erroneous doctrine" to Jencks Act cases, except in a very limited area where its application depends upon a determination of fact, is to turn the tables upside down.

In a case decided shortly after Judge Moore's opinion on the first Birnbaum appeal, another panel in the Second Circuit appears to have rejected the proposition upon which his opinion rested. In *United States* v. *Ellenbogen,* 341 F. 2d 893 (CA 2, 1965), the lower court had refused to make available an FBI report, which contradicted some testimony given by the witness upon the trial. In seeking to overcome the error, the government argued on appeal that, under *Cardillo* and the first *Birnbaum* opinions, the question whether the report "related" to the testimony was for the trial judge in the first instance and that his determination would not be disturbed in the absence of a showing that it was clearly erroneous (Govt. Br. in *Ellenbogen,* pp. 32-34; Govt. Pet. for Rehearing, pp. 9-10).

After declaring that the statement in question was "related" to the witness' testimony, Judge Marshall, now Solicitor General, said (p. 894) that there was "no room

[1] Judge Moore did not discuss the ground upon which Judge Murphy apparently acted, but seems to say that a trial judge has discretion to withhold a statement, which in all respects meets the conditions of the Act, if he thinks it would be ineffective for cross-examination (p. 7, *supra*).

for the trial judge, nor for us, to speculate as to how useful this statement will be for purposes of cross-examination or how important such cross-examination will be to defendant's case * * *". He then disposed of the reliance on *Cardillo* and *Birnbaum* by saying that the statements there were merely "general language", and that "both of these cases expressly recognize the principle that prior statements that relate 'generally to the events and activities testified to' must be produced" (p. 894).

It seems obvious that, in writing for himself and Judges Friendly and Hays, Judge Marshall was, in polite language, rejecting the ground upon which Judge Moore went off on the first Birnbaum appeal. And that would have ended the matter but for the fact that, upon the application for reargument on the second appeal, a different panel, of which Judge Moore was one, said that *Ellenbogen* in no way modified the first Birnbaum opinion (B 2).

The situation in other circuits can be briefly stated. While the standard followed in some is uncertain, it can be fairly said that the test applied in the Court of Appeals for the District of Columbia and in the Third and Eighth Circuits is directly opposed to that in the Second in this case and is in conformity with a limited application of the harmless error doctrine [*Williams* v. *United States,* 338 F. 2d 286, 289-91 D.C. Cir., 1964); *United States* v. *McCarthy,* 301 F. 2d 796, 799-801 (CA 3, 1962); *United States* v. *Meisch,* 370 F. 2d 768, 771-72 (CA 3, 1966); *Lewis* v. *United States,* 340 F. 2d 678, 682 (CA 8, 1965); *Banks* v. *United States,* 348 F. 2d 231, 233-36 (CA 8, 1965)].

It might be thought that by this time the federal prosecutors would no longer risk reversal by withholding prior statements of witnesses that might fall within the Jencks Act, but as Judge Friendly noted with "wonder", the old

attitude still persists (*United States* v. *Borelli*, 336 F. 2d 376, 393 (CA 2, 1964), cert. den., 379 U. S. 960).[1]

4. The charge to the jury went beyond any conceivable limits of the harmless error doctrine

From what we have said in our brief description of the charge (pp. 9-10, *supra*) and the fuller statement in Chief Judge Lumbard's dissent (A 31-39), there can hardly be any question that the charge was prejudicial. Judge Cooper unwittingly identified himself with the cause of the prosecution and his charge was a one-sided, inaccurate statement of the facts. Upon the cross-examination of Guterma, Leonhardt and Eveleigh, the defense brought out the crimes they had committed (74-77a, 89-97a, 212-16a, 292-93a), and, in charging the jury, Judge Cooper turned that evidence against Birnbaum in part and, in effect, invited the jury to find him guilty by association. He carried the charge to an intolerable length, with increasing emotional tension and the obscuring of applicable legal principles. Even the prosecutor asked the judge to modify the charge (p. 10, *supra*). In the words of Chief Judge Lumbard, "the trial court's charge to the jury went so far beyond permissible limits of comment that it denied Birnbaum the fair trial to which every defendant is entitled" (A 31).

It would be desirable, we suggest, for this Court to remind the lower tribunals that the charge to the jury is probably the most important function performed by the trial judge, that a fair and restrained charge is essential to a fair trial, and that no form of the harmless error doctrine may be pushed to condoning a charge like

[1] A count of the number of reported cases in which the courts of appeals had to apply their concepts of the harmless error rule in Jencks Act cases within the last three years, 1964-66, disclosed at least 19 such instances.

this. In any number of respects, the judge disregarded principles that should govern a charge.[1]

The petition for certiorari should be granted.

Respectfully submitted,

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[1] It is doubtful whether a judge should sum up the facts at all if, as here, there have been summations by capable counsel, but if he is going to do so, he should avoid animated argument; the charge must be evenly balanced; "repetitious and unnecessarily long charges are confusing"; and, except in rare instances, judges should not charge the jury extemporaneously and risk prejudicial inaccuracies [*United States* v. *Kahaner*, 317 F. 2d 459, 479, 480 (Friendly, J., 1963), cert. den. 375 U. S. 835; *Allison* v. *United States*, 160 U. S. 203, 217 (1895); *Quercia* v. *United States*, 289 U. S. 466, 470 (1933); *United States* v. *Persico*, 349 F. 2d 6, 8 (CA 2, 1965); *Martin* v. *Los Angeles Turf Club Inc.*, 39 Cal. App. 2d 338, 342-43, 103 P. 2d 188, 190 (1940)].